Supreme Court, U.S.
FILED
OCT 1 2001
CLERK

(3)

No. 01-0207

In the
# Supreme Court of the United States

THOMAS RICHARD,
*Petitioner*,

v.

STATE OF OHIO,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO

## REPLY TO BRIEF IN OPPOSITION

JAMES R. WILLIS, ESQ., #0032463
*Counsel of Record*
THE ST. CLAIR BUILDING
113 ST. CLAIR AVENUE, N.E.
SUITE 440
CLEVELAND, OH 44114-1214
(216) 523-1100
(216) 861-4161 (FAX)

*Counsel for Petitioner*

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

9pp

## TABLE OF CONTENTS

PAGE

Table of Contents . . . . . i

Table of Authorities . . . . . ii

Reply To Respondent's Argument No. I . . . . . 1

Reply To Respondent's Argument No. II . . . . . 1

Reply To Respondent's Argument No. III . . . . . 3

Reply To Respondent's Argument No. IV . . . . . 4

Reply To Respondent's Argument No. V . . . . . 4

Conclusion . . . . . 6

## TABLE OF AUTHORITIES


PAGE

*Illinois v. Gates*, 462 U.S. 213 (1983) . . . . . 1

*Jones v. United States*, 362 U.S. 257 (1960) . . . . . 1

*Richards v. Wisconsin*, 520 U.S. 385 (1997) . . . . . 2, 3

*Roviaro v. United States*, 353 U.S. 53 (1957) . . . 3, 5, 6

*United States v. One Attached Garage, etc.*, 603 F.2d 231 (7th Cir. 1979) . . . . . 5

*United States v. Ordonez*, 737 F.2d 793 (1984) . . . . . 6

*Will v. United States*, 389 U.S. 80 (1957) . . . . . 6

*Wilson v. Arkansas*, 514 U.S. 927 (1995) . . . . . 2


## RULES, STATUTES AND OTHER AUTHORITIES


R.C. of Ohio, §2935.12(A) . . . . . 2

## REPLY TO RESPONDENT'S ARGUMENT NO. I

Respondent's argument that the affidavit sets forth probable cause ignores several critical facts. Included in this thesis is the fact that apart from the officer's testimony that they saw an exchange in front of one of the searched premises, which exchanges were denied, there is nothing that supports the conclusion a search would have yielded any of the items on the State's laundry list denominated in the search warrant.

With this being so, telling the Court what **Illinois v. Gates,** 462 U.S. 213 (1983) and **Jones v. United States,** 362 U.S. 257 (1960), held clearly was a wasted effort. For who in this business is not thoroughly familiar with those cases?

On the other hand, it seems counsel would have addressed the fact that there is nothing in a showing of a few isolated drug sales (for a grand total of less than $200.00), even if these sales took place, that would justify searching the premises in front of which these few sales occurred. Also, it is significant that there was nothing even alleged in the affidavit that connected the occupants of the homes searched to any alleged drug activity.

## REPLY TO RESPONDENT'S ARGUMENT NO. II

Here counsel makes an argument that could only be valid if this Court ignored the "knock and announce" concept one gets from this Court's decisions. It would also require the Court to literally capitulate to the obviously warped thinking being fed to us in counsel's reasoning.

For our part, it requires a certain amount of gall for one to argue, in spite of **Richards v. Wisconsin**[1] and **Wilson v. Arkansas**[2], that the police can dispense with, at their discretion, the knock and announce requirement. And, that this can be done even when the facts show there was a State statute that purports to authorize no-knock entries where certain factual showings are made - - and the officers made no effort to obtain such authorization.

Given that counsel-opposite concedes our knock and announce statute (**R.C. of Ohio, §2935.12[A]**) was not complied with, it follows the entry here cannot be justified. This is particularly so since the precedent applicable here requires the reasonableness of a particular entry to "be evaluated at the time [the police] entered...." **Richards v. Wisconsin,** 520 U.S. 385, 394 (1997). The insuperable point here made distills from the fact that the affidavit and the oral testimony provided as justification for the abrupt entry made refers only to asserted facts as they were thought to exist at the time the search warrant was obtained. Obviously these facts were assertedly known when the officers made the decision not to request a no-knock warrant. See **Richards,** 520 U.S., at 336, n. 7.

Now we do recognize that in **Richards** this Court approved a forcible no-knock entry after the officers had sought and had been denied a no-knock warrant (**id.,** at pp. 395-396), and we recognize the Court's discussion of the officers exercising their "independent judgement" in these circumstance (**id.**, p. 396, n. 7). But, of course, the facts in

---

1 **Richards v. Wisconsin,** 520 U.S. 385 (1997).

2 **Wilson v. Arkansas,** 514 U.S. 927 (1995).

**Richards** show the officers in abruptly entering as they did were prompted by exigent circumstances of a sort that were unforseen and which were encountered during the execution of the warrant. Indeed, the Court recognized this to be the case (**ibid**).

## REPLY TO RESPONDENT'S ARGUMENT NO. III

Here again we have counsel arguing on the basis of the warped philosophy one gets from our State cases, which have invariably found a way to reach the conclusion that a case was not made for the disclosure of these arguably phantom informants. While all of these cases concede the existence of **Roviaro v. United States,** 353 U.S. 53 (1957), they fail to look past the fact that this Court has required disclosure of the informant's identity when it would be beneficial to the defense, particularly where (as here) the informant, if he (or she) actually exists, would be a percipient witness. In these situations clearly proof of his existence is a critical element of the charge that he (or she) made a direct purchase from the accused. This is especially so where (as here) the accused denied any drug sale involving him ever occurred. Indeed, he charged the officers with actually lying about having witnessed any such sale.

Given that it is not unheard of that such things have occurred, it only makes sense that disclosure was required here. After all, this was a jury trial and one of the charges was a direct sale of drugs was made by petitioner to this *alleged*, arguably phantom, informant whose identity was not disclosed.

## REPLY TO RESPONDENT'S ARGUMENT NO. IV

Counsel concedes, as counsel-opposite argues, "petitioner attacked the credibility of the police officers" (**Brief In Opposition, p. 22**). With this being so (and our assailment is not limited to their fabrication of the alleged informant and of the information allegedly imputed to him), it follows all the verdicts in this case would be invalid if indeed disclosure was wrongfully denied.

## REPLY TO RESPONDENT'S ARGUMENT NO. V

Here again, counsel-opposite in arguing the $40,000.00 seized from petitioner's home was properly forfeited to the State, bombards us with rhetoric rather than direct the Court to any facts that show a basis for the declared forfeiture.

Again counsel wastes our time by lecturing to us as to what she believes the law to be in this area. Here it should be sufficient to state that it is not enough for the State to simply argue that there was sufficient evidence presented at trial that supported the finding that the money was "used in the commission of drug offenses" (**Brief In Opposition, p. 27**).

Here it is significant to note what the State contends was its proof these funds "were used in the commission of the drug offenses" in this case (**ibid**). The State contends its proof distills from the *asserted* fact that:

> Several witnesses testified to the significant amount of drug activity taking place at the 8407 Wade Park house and Petitioner was seen traveling from the 8407 Wade Park to the 8722 Beckman Road while conducting illegal drug

> sales. *Richard*, 2000 WL 1800632 at 11. The money was bundled together in amounts of $2,000 with the various amounts of the bills in random order. Id. Police found $40,000 in U.S. currency hidden in a clothes dryer at the 8722 Beckman Road house. Id. at 7. Two scales commonly used in drug activity were also found on the premises. Id. There was a sufficient showing that the confiscated cash was used in the commission of drug trafficking, providing a nexus between the money and Petitioner's criminal activity. Consequently, the trial court properly determined that it was contraband subject to forfeiture.

**Brief In Opposition, pp. 28-29**.

Distilled these recited facts hardly show these funds were connected in any way with the charged, or any other, drug offenses. To accept counsel's thesis this Court must conclude it is enough that the money involved can be said to be a large sum of money. And with that being so, anyone who claims this money must prove its source was lawful. Obviously this is not the law. See **United States v. One Attached Garage, etc.,** 603 F.2d 231 (7th Cir. 1979).

Also, on the informer disclosure issue we readily concede, as was recognized in **Roviaro**, the Court must balance the "public interest "in protecting the identity of an informant against the need for disclosure in order to prepare an adequate defense." In so doing, given in this case the accused denied that he ever participated in any drug sales with anyone, at any time, including the sales charged in this case, it follows proof of the existence of the alleged informant was required.

With this being so, it is clear that petitioner had every right to defend the charges in this case by showing the officers *lied* about the existence of the alleged informant, or they lied about having him involved in a drug transaction with this alleged person. If not that, then they were mistaken in their identification.

Given the above possibilities, and given the fact that the alleged person said to be an informant was a percipient witness to the alleged transaction, it follows the revelation of his identity, if he exists, would be relevant and helpful to the defense. The same would be true if the State were unable to produce an informant. For that too would be relevant and helpful to the defense. See, in addition to **Roviaro, *supra*, Will v. United States,** 389 U.S. 80 (1957) and **United States v. Ordonez,** 737 F.2d 793 (1984).

## CONCLUSION

For all of the reasons argued in the Petition and above, this cause should be reviewed to the end that it can be reversed.

Respectfully submitted,

**JAMES R. WILLIS, ESQ.**
**Ohio Reg. No. 0032463**
The St. Clair Building
113 St. Clair Avenue, N.E.
Suite 440
Cleveland, Ohio 44114-1214
(216) 523-1100
(216) 861-4161 (Fax)
**Attorney for Petitioner**